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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,
Petitioner,
v.
P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Respondent,
and
UNITED STATES OF AMERICA,
Intervenor-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE OF PRISON FELLOWSHIP MINISTRIES AND THE ALEPH INSTITUTE IN SUPPORT OF RESPONDENTS

Of Counsel:
ISAAC M. JAROSLAWICZ
THE ALEPH INSTITUTE
9540 Collins Avenue
Surfside, Florida 33154-7127
(305) 864-5553

MICHAEL JOSEPH WOODRUFF
Counsel of Record
SCOTT J. WARD
J. MATTHEW SZYMANSKI
STEPHEN M. CLARKE
GAMMON & GRANGE, P.C.
8280 Greensboro Drive
7th Floor
McLean, Virginia 22102-3807
(703) 761-5000

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the enactment of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, was a proper exercise of constitutional authority under Section 5 of the Fourteenth Amendment by Congress and the President of the United States.

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First Covenant Church v. City of Seattle, 120 Wash.2d 203, 840 P.2d 174 (1992) 25
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Friend v. Kolodzieczak, 65 F.3d 1514 (9th Cir.), *as amended on denial of reh'g en banc*, 72 F.3d 1386 (9th Cir. 1995) 27

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George v. Sullivan, 896 F. Supp. 895 (W.D. Wisc. 1995)	17
Gilbert v. Minnesota, 254 U.S. 325 (1920)	8
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Griswold v. Connecticut, 381 U.S. 479 (1965)	9
Guardians Ass'n of NY City Police Dep't v. Civil Service Comm'n, 630 F.2d 79 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981)	20
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Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995)	25, 27
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James v. Lane, —— F. Supp. ——, 1996 WL 738957 (N.D. Ind. Dec. 13, 1996)	14
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Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)	21
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Katzenbach v. Morgan, 384 U.S. 641 (1966)	21
Kecler v. Mayor & City Council of Cumberland, 940 F. Supp. 879 (D. Md. 1996)	25
Kovacs v. Cooper, 336 U.S. 77 (1949)	8
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McKnight v. Rees, 88 F.3d 417 (6th Cir.), *cert. granted*, —— U.S. ——, 117 S.Ct. 504 (Nov. 27, 1996)	13
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Muslim v. Frame, 897 F. Supp. 215, *denying re-argument of* 891 F. Supp. 226 (E.D. Pa. 1995)	26, 27
O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)	7, 11
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Santana v. United States, 98 F.3d 752 (3d Cir. 1996)	14
Sasnett v. Sullivan, 91 F.3d 1018 (7th Cir. 1996), *aff'g* 908 F. Supp. 1429 (W.D. Wis. 1995), *pet. for cert. filed*, 65 U.S.L.W. 3370 (Oct. 29, 1996)	14, 23, 24, 26, 29
Scott v. City of Anniston, 597 F.2d 897 (5th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980)	20
Shapiro v. Thompson, 394 U.S. 618 (1969)	9
Small v. Lehman, 98 F.3d 762 (3d Cir. 1996)	26
South Jersey Catholic School Teacher Ass'n v. St. Teresa Church Elementary School, 290 N.J. Super. 359, 675 A.2d 1155 (App. Div.), *cert. granted*, 146 N.J. 567, 683 A.2d 1162 (1996)	18
State v. Miller, 196 Wis.2d 238, 538 N.W.2d 573 (Wis. App. 1995), *aff'd*, 202 Wis.2d 56, 549 N.W.2d 235 (1996)	18
Stefanow v. McFadden, —— F.3d ——, 1996 WL 737423 (9th Cir. Dec. 27, 1996)	27
Storm v. Town of Woodstock, 944 F. Supp. 139 (N.D.N.Y. 1996)	26, 28

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Stuart Circle Parish v. Bd. of Zoning Appeals of Richmond, —— F. Supp. ——, 1996 WL 685755 (E.D. Va. Nov. 26, 1996)	26
Truax v. Raich, 239 U.S. 33 (1915)	9
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United States v. Bauer, 84 F.3d 1549 (9th Cir.), *cert. denied*, —— U.S. ——, 117 S.Ct. 267 (1996)	18, 24
United States v. City of Chicago, 573 F.2d 416 (7th Cir. 1978)	20
United States v. Commonwealth of Virginia, 620 F.2d 1018 (4th Cir.), *cert. denied*, 449 U.S. 1021 (1980)	20
Vitek v. Jones, 445 U.S. 480 (1980)	8
Werner v. McCotter, 49 F.3d 1476 (10th Cir.), *cert. denied*, —— U.S. ——, 115 S.Ct. 2625 (1995)	26
Constitutional Provisions and Statutes:	
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American Indian Religious Freedom Act Amendments of 1994, 42 USCA § 1996a	22
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H.R. REP. No. 88, 103d Cong., 1st Sess. (1993)	9, 19, 23, 24
S. REP. No. 111, 103d Cong., 1st Sess. (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892	8, 9, 19, 24
189 CONG. REC. S14350-01, S14364 (daily ed. Oct. 26, 1993)	8, 10
139 CONG. REC. S14451-01, *et seq.* (daily ed. Oct. 27, 1993)	9

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139 CONG. REC. S14461-01, *et seq.* (daily ed. Oct. 27, 1993) 7, 8, 12, 18, 23
139 CONG. REC. S14468 (daily ed. Oct. 27, 1993) 9, 13
140 CONG. REC. H11193-05 (daily ed. Oct. 6, 1994) 3
Hearings Before House Committee on the Judiciary, Subcommittee on the Constitution (July 23, 1996) 22

Books and Articles:

G. DE BEAUMONT AND A. DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE (1964, orig. pub. 1833) 6
C. Colson, *Towards an Understanding of Imprisonment and Rehabilitation*, in J. Stott & N. Miller, eds., CRIME AND THE RESPONSIBLE COMMUNITY 158 (1980) 16
R. Cruz, Comment, *Animal Sacrifice and Equal Protection Free Exercise*: Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 17 HARV. J.L. & PUB. POL'Y. 262 (1994) 21
R. Duff, *Expression, Penance and Reform*, in J.G. Murphy, ed., PUNISHMENT AND REHABILITATION (3d ed. 1995) 11
T. Evans, *et al., Religion and Crime Reexamined: The Impact of Religion, Secular Controls, and Social Ecology on Adult Criminology*, 33 CRIMINOLOGY 195 (1995) 7
D. GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY (1990) 6, 7
B. Johnson & D. Larson, *The Potential Benefit of the Faith Factor*, IARCA J. ON COMM. CORRECTIONS 28 (June 1995) 7
K. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U.L. REV. 1106 (1994) 21

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D. Laycock & O. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994) 18

M. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) 4

W. MOBERLY, THE ETHICS OF PUNISHMENT (1968) 11, 16

H. Morris, *A Paternalistic Theory of Punishment*, in J.G. Murphy, ed., PUNISHMENT AND REHABILITATION 158 (3d ed. 1995) 11

H. Morris, *Persons and Punishment*, in J.G. Murphy, ed., PUNISHMENT AND REHABILITATION 93 (3d ed. 1995) 11

P. Nolan, *Justice Spotlight*, 13 JUSTICE REPORT (Jan. 1997) 12

T. O'Connor, *The Impact of Religious Programming on Recidivism, the Community and Prisons*, IARCA J. ON COMM. CORRECTIONS 13 (June 1995) 11

M. Paulsen, *A RFRA Runs Through It*, 56 Mont. L. Rev. 249 (1995) 18

M. Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029 (1993) 29

S. Rosenzweig, Comment, *Restoring Religious Freedom to the Workplace: Title VII, RFRA, and Religious Accommodation*, 144 U. PA. L. REV. 2513 (1996) 29

D. Solove, Note, *Faith Profound: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459 (1996) 27

A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Mayer ed., 1969) 6

W.B. Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979) 7

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J.B. Weinstein, *Prison Need Not Be Mandatory: There Are Options Under the New U.S. Sentencing Guidelines*, 28 No. 1 JUDGES' J. 16 (Jud. Admin. Div. Amer. Bar Ass'n 1989) 16

M.C. Young, *et al.*, *Long-Term Recidivism Among Federal Inmates in Volunteer Prison Ministries*, 22 J. OF OFFENDER REHAB. 97 (1995) 11

Other Authorities:

Inmate Litigation and the PLRA, in CORRECTIONS COMPENDIUM: THE NATIONAL JOURNAL FOR CORRECTIONS, Volume XXI, No. 12 (December 1996) 14

FLORIDA DEPARTMENT OF CORRECTIONS ("FL DOC"), Inmate requests and responses (on file with amici Aleph Institute) 4, 12

STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, *Handbook of Religious Beliefs and Practices* (1987, Rev. 1995) 5, 15

Standing for Religious Freedom, 13 JUSTICE REPORT (Jan. 1997) 12

Death Row Inmate Wins Fight to Wear Yarmulke, MIAMI HERALD 11A (Apr. 4, 1996) 12

MISSOURI DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES, INSTITUTIONAL SERVICES, POLICY AND PROCEDURE MANUAL, Procedure No. 1517-1.1, *Religious Programs and Activities* (Dec. 15, 1995) 5, 15

Religious Freedom Restoration Act, live video conference (National Institute of Corrections Academy, July 27, 1995) 15

Text of President Clinton's Memorandum on Religion in Schools, N.Y. TIMES, JULY 13, 1995, at B10 22

UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, *Program Statement No. 5360.06* (Aug. 29, 1995), *Subject: Religious Beliefs and Practices of Committed Offenders* (rules effective Sept. 6, 1995) 5

INTEREST OF AMICI CURIAE

Amici Prison Fellowship Ministries ("PFM") and The Aleph Institute ("Aleph") submit this brief in support of Respondent to urge the Court to affirm the decision below and uphold the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb ("RFRA") as constitutional. *Amici,* having a direct interest in how religion is treated in state and federal prisons, ask the Court to consider that RFRA now enables the proper accommodation of free exercise of religion, as a fundamental right retained by prisoners, and helps advance important penological objectives, including the reduction of recidivism.

Prison Fellowship Ministries. PFM is a tax exempt, charitable and religious organization founded in 1976 by Charles W. Colson to assist the church in its ministry to prisoners, ex-prisoners, crime victims and their families. Coordinating its ministry through 54 area offices and the service of more than 50,000 volunteers, PFM provided more than 3,000 in-prison programs in 1996 to more than 250,000 inmates nationwide. It publishes many resources, including *Inside Journal*, a newspaper serving a third of the nation's prison population, Bible studies for individuals and groups, and seminar materials for prisoners and their spouses. It sponsors an annual Christmas Angel Tree gift program that has reached more than 2.5 million children of inmates since 1982. Its work is now effectively extended through affiliates Justice Fellowship (27 state task forces on criminal justice policy and reform), Neighbors Who Care (chapters in eight states sponsoring local crime victims assistance programs), and Prison Fellowship International (organizations in 76 nations working for just and effective criminal justice systems in each country).

The Aleph Institute. Hailed by the Rev. Charles Riggs, former Chief Chaplaincy Administrator for the Federal Bureau of Prisons, as "the most significant rehabilitative program for Jewish prisoners in the history of the U.S. prison system," Aleph is a not-for-profit, national Jewish

educational, humanitarian and advocacy organization founded in 1981 by Rabbi Sholom D. Lipskar at the direction of Rabbi Menachem M. Schneerson, the Lubavitcher Rebbe, of blessed memory. Aleph helps Jewish inmates and their families maintain essential connections to each other and to their spiritual heritage, providing educational materials to children of Jewish inmates, counseling to spouses, parents and children, and financial assistance to families in need.

Aleph is in the forefront of defending Jewish inmates' religious freedom, their rights to possess essential religious articles, books and clothing, and to properly observe the mandated tenets of their religion. Aleph also provides resources for Jewish inmates who would otherwise be unable to observe daily and holy days ritual requirements. It provides thousands of candles, prayer books, and grape juice to enable Jewish inmates to welcome Sabbath properly at those institutions that will let them. It provides menorahs and candles at Chanukah through its "Lights Across America" program. It distributes thousands of pounds of matzo, grape juice and kosher-for-Passover foods for at least the two Passover Seder ritual celebration meals. It provides rabbinical visits to give educational materials, counseling and spiritual support to the more than 6,000 Jewish immates at all federal, state and county prisons.

Prison officials and chaplains across the country are regularly informed through the *Aleph Advisory* newsletter about all mandated Jewish holy days, with explanations of the ritual items needed, and their availability without cost.[1] Aleph is also now publishing the *Institutional*

[1] In a system in which Jewish inmates represent a minute percentage of the general population—and are often surrounded by hostile forces—non-Jewish prison chaplains and administrators often lack the personnel, specialized knowledge, or resources necessary to meet the spiritual needs of Jewish inmates. Many are unfamiliar with menorahs, Chanukah candles, matzo, kosher-for-Passover foods and daily ritual practices, including prayer shawls, Tefillin (phylacteries), kosher diet and facial hair restrictions. Aleph exists to help meet such needs.

Handbook of Jewish Practice and Procedure for use by prison officials throughout the country.

The Importance of RFRA to Inmates. *Amici* strongly maintain that RFRA's broad protection is necessary and essential for *all* inmates, of whatever religious faith, to properly observe their own religious traditions, subject to bona fide necessities of prison discipline, security, safety and order. Under RFRA, never again should any inmate suffer an official but capricious excuse, denying a proper request to accommodate religious observance; indeed, this is what *Amici* fear would recur without RFRA.

The Solicitor General of the United States' letter of consent to the filing of this brief is filed herewith pursuant to Rule 37.3. The remaining parties have filed general consents with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress' enactment of RFRA was a monumental accomplishment, called "among the most significant civil rights legislation in our history."[2] Nevertheless, RFRA has detractors who belittle the problems it seeks to remedy. *Amici* PFM and Aleph respond to Petitioner's subtle suggestion that RFRA's effect on such matters as "prison oversight" has been pernicious.[3] *Amici* in support of Petitioner go so far as to offer a "parade of horribles" relating to RFRA.[4] However, not only is there no case or controversy regarding RFRA's applicability to prison administration, the suggestion invites the wrong result. Contrary to Petitioner's misreading of *Employment Division v. Smith*, 494 U.S. 872 (1990), Congress acted

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[2] *See* 140 CONG. REC. H11193-05, S11195 (daily ed. Oct. 6, 1994) (statement of Cong. Waxman). Passed by overwhelming bipartisan majorities in Congress (House of Representatives, unanimously by voice vote; Senate, 97-3), RFRA was signed into law by President Clinton on November 16, 1993.

[3] *See* Brief of Petitioner City of Boerne, Texas (hereinafter "Pet. Br.") at 21.

[4] *See* Brief of Amici States of Ohio, *et al.* in Support of Petitioner (hereinafter "Amici States Br.") at 2-8.

properly under section 5 of the Fourteenth Amendment in considering how best to protect religious liberty when government substantially burdens its exercise. In doing so, it reached no novel result concerning treatment traditionally accorded religious liberty in this country.[5] As this Court recognized in *Smith*, "[v]alues that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process." *Id.* at 890. Just as anticipated, RFRA was the result of such a political process: "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." *Id.*

Prisoners' fundamental and constitutional right to the free exercise of religion, *i.e.*, to engage in acts only for religious reasons, is generally conducive to penological objectives. Congress sacrificed no essential governmental interests in prison security and order when determining that non-compelling governmental interests must yield to prisoners' religious accommodation claims. For inmates, particularly minority religious adherents, RFRA is a critical means of redressing egregious problems previously beyond practical judicial resolution, whether due to the time it takes to exhaust administrative remedies while religious holidays and observances are being missed, mootness resulting from arbitrary transfers, or other causes.[6]

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[5] M. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

[6] *See infra* note 24 and accompanying text. These problems included prison officials' prohibiting acts engaged in only for religious reasons—such as denying an Episcopalian inmate access to sacramental wine at communion outside prison and barring practicing Jewish inmates from wearing beards or yarmulkes, eating kosher food, conducting a Passover Seder, or lighting Chanukah candles. Jewish inmates have been prohibited from congregating for prayer, despite Muslim co-inmates being accorded such privileges as a result of having filed suit. *See, e.g.*, State of Florida Department of Corrections ("FL DOC"), Inmate Request form for Gary Parker (Feb. 20, 1996) (copy on file with *amicus* Aleph Institute).

Such problems, implicating this fundamental right, called for a legislative response consistent with this Court's invitation in *Smith* for political branches of government to provide the means of exemptions. Petitioner misunderstands *Smith* to say that if religious exemptions are not constitutionally required, then Congress may not even permit them as a matter of legislative grace. This stands the Court's reasoning on its head. Congress, exercising its express powers under Section 5 of the Fourteenth Amendment, responded to protect fundamental free exercise rights that it determined were being violated. The subject rights are textually located in the First Amendment and incorporated into the Fourteenth Amendment by this Court as a matter of well-established legal doctrine. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

The Federal Bureau of Prisons, and many States, have established guidelines for prisons that work well with RFRA. *Amici* submit that the preparation of appropriate guidelines for responding to requests for religious accommodation will ease concerns for administering the diversity of requests that are being made.[7] That inmates represent different faith groups need not be a problem for state officials. Facilitating religious exercise among inmates will help to improve morale and relationships with others,

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[7] Several States have put in place guidelines that successfully implement RFRA. *See, e.g.*, STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, *Handbook of Religious Beliefs and Practices*, (1987, Rev. 1995) (which *amici* understand is serving as unofficial guidelines for prison officials in approximately 40 states); MISSOURI DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES, INSTITUTIONAL SERVICES, POLICY AND PROCEDURE MANUAL, Procedure No. 1517-1.1, *Religious Programs and Activities* (Dec. 15, 1995), at 1 ("This procedure should ensure that inmates have access to the requirements of their religious faith according to the Religious Freedom Restoration Act while ensuring the good order and security of the institution and safety of the inmates and staff."); UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, *Program Statement No. 5360.06* (Aug. 29, 1995), *Subject: Religious Beliefs and Practices of Committed Offenders* (rules effective Sept. 6, 1995).

increase inmates' potential for reintegration into the community upon release, and reduce recidivism. With appropriate information, prison officials can respond positively to inmates' diverse religious practices and requests while maintaining all necessary penological interests.

ARGUMENT

I. BY ENACTING RFRA, CONGRESS TREATED RELIGIOUS EXERCISE AS A FUNDAMENTAL RIGHT IN PRISON SETTINGS, CONSISTENT WITH HISTORIC PRACTICE.

While *amici* States focus on the burdens on their prison systems purportedly caused by RFRA, they ignore the substantial benefits that free exercise of religion brings to the American correctional system. Alexis de Tocqueville, noted for his early survey of American political and social institutions,[8] examined the American penitentiary system with de Beaumont in 1833.[9] They found religion to be an indispensable part of the rehabilitation of criminals isolated by confinement from the general public.[10] Significantly, they concluded that in America, unlike France where prisons were "schools for crime," the presence of religion worked to achieve the remarkably low recidivism rate of one in twenty.[11] This was due not only to the influence of volunteer religious workers visiting prisoners to provide literacy instruction and religious counseling, but also to the prisoners' access to religious materials and

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[8] A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Mayer ed., 1969).

[9] G. DE BEAUMONT & A. DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE (1964, orig. pub. 1833).

[10] *See* D. GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 269-70 (1990) (solitary confinement made inmates amenable to moral instruction, even as reformed moral codes presumed their subjects were "free, rational, responsible and self-directed" persons).

[11] DE BEAUMONT AND DE TOCQUEVILLE, *supra* note 9, at 57, 80-102. In those prisons where religion was not integrated into the daily program, the rate of recidivism was more than three times greater. *Id.*

the isolation of inmates from each other that afforded each an opportunity for reading and reflection in silence. These conditions facilitated the experience of contrition, repentance, and a reform of life in transformative ways.[12] Modern day studies have upheld these conclusions.[13]

Congress has periodically expressed concern for the guarantee of certain basic rights to prisoners, particularly their religious liberty.[14] As has been clearly and repeatedly noted by members of this Court, prisoners retain their religious liberty.[15] When Congress enacted RFRA in

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[12] *See* GARLAND, *supra* note 10, at 136 (citing the qualitative shift in the aims of punishment between about 1750 and 1820 throughout Europe and America as "measures to affect the 'soul' of the offender rather than just strike his body . . . [with] the concern . . . less to avenge the crime than to transform the criminal who stands behind it."); *id.* at 203 ("throughout the history of penal practice religion has been a major force in shaping the ways in which offenders are dealt with.")

[13] *See* T. Evans, *et al., Religion and Crime Reexamined: The Impact of Religion, Secular Controls, and Social Ecology on Adult Criminology*, 33 CRIMINOLOGY 195 (1995) (research study found participation in religious activities was a persistent and noncontingent inhibiter of adult crime); B. Johnson & D. Larson, *The Potential Benefit of the Faith Factor*, IARCA J. ON COMM. CORRECTIONS 28 (June 1995) ("The evidence demonstrating the benefit of religion in terms of rehabilitation is largely anecdotal, but still important.").

[14] *See* 139 CONG. REC. S14461-01, S14462 (daily ed. Oct. 27, 1993) (statements of Sens. Lieberman, Hatch and Danforth); *cf.* W. Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 653 n.204 (1979) (remarks on the efforts of the 95th Congress to address prisoners' need for enforcement of their rights).

[15] *See Lewis v. Casey*, —— U.S. ——, 116 S.Ct. 2174, 2205 (1996) (Souter, J., concurring and dissenting) ("prisoners do not entirely forfeit certain fundamental rights, including . . . the right to free exercise of religion"); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) ("Inmates clearly retain protections afforded by the First Amendment, including its directive that no law shall prohibit the free exercise of religion.") (citations omitted); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (marriage is a fundamental right allowed to prisoners when there is no threat to security, order, or

1993, it specifically considered the importance of religious exercise to prisoners,[16] following the time-honored recognition that religion is not only among fundamental rights, but is a "preferred" right of the "highest order."[17] A fundamental right literally expressed in the text of the Constitution is, *a fortiori*, entitled to no less protection than is always reserved for nonliteral rights found in the concept of liberty.[18] Unlike *Lewis v. Casey*, 116 S.Ct.

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public safety and has spiritual significance to many religious; and marriage commitment "may be an exercise of religious faith, as well as an expression of personal dedication."). *But cf. Lewis v. Casey*, 116 S.Ct. at 2185 ("a prison regulation impinging on inmates' constitutional rights 'is valid if it is reasonably related to legitimate penological interests.' ").

[16] *See, e.g.*, 139 CONG. REC. S14461-66 (statements of Sens. Hatch, Lieberman, Coats, Dole, Hatfield, and Danforth).

[17] *See* 139 CONG. REC. S14350-01, S14364 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) ("religious liberty . . . is the most fundamental liberty any human being can claim . . . Even the most scorned in our society, prison inmates, have a legitimate interest in religious liberty."); S. REP. No. 111, 103d Cong., 1st Sess., at 9 & n.22 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892 (citing cases); *see also Gilbert v. Minnesota*, 254 U.S. 325, 343 (1920) (Brandeis, J., dissenting) (Fourteenth Amendment guarantees more than the liberty to acquire and enjoy property); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (per Cardozo, J.) (Bill of Rights made applicable to the states to preserve principles of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental"); *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring) (fundamental liberties are those "of the individual which history has attested as the indispensable conditions of an open as against a closed society"); *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("The First Amendment's guarantees, as applied to the States through the Fourteenth Amendment . . . are to be read together . . . to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.").

[18] *See M.L.B. v. S.L.J.*, —— U.S. ——, 117 S.Ct. 555, 1996 WL 716328 (Dec. 16, 1996) (liberty interests in marriage and family life, *id.* at *9, and fundamental political rights, *id.* at *13); *Vitek v. Jones*, 445 U.S. 480, 492 (1980) (liberty interests in personal

at 2187 (Thomas, J., dissenting) where Justice Thomas noted a weakness in constitutional analysis when courts cannot agree upon the constitutional source of "the supposed right," in the present case religious exercise is expressly found in the text of the First Amendment. When Congress enacted RFRA by exercising its power under Section 5 of the Fourteenth Amendment, it was obligated to treat the unalienable right of free religious exercise with the *same* high level of protection that has been accorded *all* fundamental rights (many of which are found only implicitly in the concept of liberty or due process). That the exercise of the fundamental right of religious freedom is necessarily reduced in prison, should not lessen its significance when no governmental interest justifies its denial in a specific instance.

When Congress considered prisoners' rights of religious exercise, it accepted the premise that religious exercise is a basic or fundamental right that reaches even into prison. By enacting RFRA, Congress safeguarded prisoners' rights where substantial burdens upon religious exercise give rise to claims that may then be assessed in light of legitimate penological interests.[20]

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security of an inmate were implicated upon involuntary transfer to mental institution); *Griswold v. Connecticut*, 381 U.S. 479, 508-09 (1965) (Black, J., dissenting) (no textual basis existed in Constitution for privacy right that Court found in the penumbra of Bill of Rights); *Truax v. Raich*, 239 U.S. 33, 41 (1915), *cited with approval in Hampton v. Mow Sun Wong*, 426 U.S. 88, 102-03 & n.23 (1976) (liberty interest found in right to be eligible to work); *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969) (liberty interest in interstate travel); *see also M.L.B. v. S.L.J.*, 1996 WL 716328 at *23 nn.3-5 (Thomas, J., dissenting).

[19] *See Bell v. Wolfish*, 441 U.S. 520, 545 (1979) ("There is no iron curtain drawn between the Constitution and the prisons of this country.").

[20] *See* H.R. REP. No. 88, 103d Cong., 1st Sess. at 7 (1993); S. REP. No. 111, 103rd Cong., 1st Sess., at 9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1899; 139 CONG. REC. S14451-01,S14462-66 (daily ed. Oct. 27, 1993) (statement of Sens. Lieberman, Coats, and Hatfield); *see also* 139 CONG. REC. S14468 (daily ed. Oct. 27,

Congress enacted RFRA because it found that governmental officials were substantially burdening religious exercise without compelling justification. Congress considered RFRA expressly remedial, by finding in past deprivations a basis for the future protection afforded by the authority of its law. It thereby equally protected citizens in all states when their unalienable right to religious liberty "is substantially burdened by government." Congress considered religious liberty as one of those fundamental rights this Court has time and again recognized as within the broad sweep of the due process and equal protection provisions of the Fourteenth Amendment, rights found essential to the concept of ordered liberty, inherent in human nature, and consequently unalienable.[21]

A. However Qualified by Governmental Interests, Free Religious Exercise Is Important To Rehabilitate Inmates and Reduce Recidivism Rates.

Despite many changes in penal theory and practice since 1833, concern for the rehabilitation of criminals

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1993) (recording rejection of proposed Senate amendment to exempt inmates' claims from RFRA); 139 CONG. REC. S14364 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (opposing amendment to exempt inmates' claims and striking a reasonable balance between competing interests).

[21] *See Smith*, 494 U.S. at 895 (O'Connor, J., concurring) ("The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachment upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests of the highest order."); *Lewis*, 116 S.Ct. at 2206 (Stevens, J., dissenting) ("Within the residuum of liberty retained by prisoners are freedoms identified in the First Amendment to the Constitution: freedom to worship according to the dictates of their conscience . . . [citations] . . . While the exercise of these freedoms may of course be regulated . . . they may not be obliterated either actively or passively. Indeed, our cases make it clear that the States must take certain affirmative steps to protect some of the essential aspects of liberty that might not otherwise survive in the controlled prison environment.") (citations omitted).

remains identified with moral and religious influence.[22] In the experience of both *amici*, the greater the inmate participation in their programs, including religious worship, educational and religious seminars, and Bible studies, the greater the likelihood of rehabilitation, successful reentry into society, and restoration to their spouses, children, and religious communities. In a preliminary study conducted by the National Institute of Healthcare Research at four New York State prisons utilizing follow-up for two years to assess recidivism among participants in Prison Fellowship Ministry programs, inmates attending ten or more Bible studies exhibited significantly lower rearrest rates as compared to nonparticipants or low participants.[23] If recidivism is the greatest problem facing

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[22] *See Hudson v. Palmer*, 468 U.S. 517, 557-58 (1984) (Stevens, J., concurring and dissenting) ("The view . . . that an inmate is a mere slave is now totally rejected. . . . [R]estraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual. 'Liberty' and 'custody' are not mutually exclusive concepts."); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 368 n.8 (1987) (Brennan, J., dissenting) (quoting *Barnett v. Rodgers*, 410 F.2d 995, 1002 (D.C. Cir. 1969) on the rehabilitative function of religion and its importance to the inmate's dignity and individuality, and citing studies of the "important role of religious commitment in penological rehabilitation"); *see also* W. MOBERLY, THE ETHICS OF PUNISHMENT 210 (1968) ("The object is that society should first make alive and deepen in itself, and secondly should convey to all its members, including the wrongdoer, a vivid sense of the wicked and destructive character of the wrongful act."); R.A. Duff, *Expression, Penance and Reform*, in J.G. Murphy, ed., PUNISHMENT AND REHABILITATION 198 (3d ed. 1995) ("We owe it to every moral agent to treat him as one who can be brought to reform."); *id.* at 169-209; H. Morris, *A Paternalistic Theory of Punishment*, in *id.* at 158; H. Morris, *Persons and Punishment*, in *id.* at 93 ("Society is today sensitive to the infringement of injustice in punishing the innocent; elaborate rules exist to avoid this evil. Society should be no less sensitive to the injustice of failing to bring back to the community of persons those whom it is possible to bring back.").

[23] T. O'Connor, *The Impact of Religious Programming on Recidivism, the Community and Prisons*, IARCA J. ON COMM. CORRECTIONS 13 (June 1995); M.C. Young, *et al.*, *Long-Term Recidi-*

corrections, and of all programs relevant to reducing the rate of recidivism, religious programs rank among the most effective, then these programs should be highly regarded by administrators as conductive to their penological objectives. In fact, RFRA has facilitated a proliferation of religious prison programs that have had very positive effects within prisons.

B. RFRA Protects Prisoners' Fundamental Religious Rights Without Impairing Legitimate Governmental Interests.

RFRA now provides a crucial legal remedy for inmates whose religious rights have been improperly curtailed by prison officials.[24] Congress had specifically considered

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vism Among Federal Inmates in Volunteer Prison Ministries, 22 J. OF OFFENDER REHAB. 97 (1995) (research findings suggested religious program content may contribute to long-term rehabilitation of certain kinds of offenders).

[24] Such denials provided substantial support for Congress' enactment of RFRA. For example, several Senators cited *McLellan v. Zavaras*, No. 93-B-2365 (D. Colo., dismissed without prejudice, Dec. 21, 1993) (unreported decision), where an inmate was allowed to attend a local Episcopal church for Sunday worship services and to serve as its organist and lay reader at the service, but was forbidden under the Department of Correction's no-intoxicant rule 507 to receive consecrated communion wine at church during Holy Eucharist. *See* 139 CONG. REC. S14461-01, S14462-67 (daily ed. Oct. 27, 1993) (statements of Sens Danforth, Hatfield, and Lieberman); *see also id.* at S14467 (statement of Sen. Danforth) (Catholic inmates in California county jail denied permission to possess rosary beads on grounds it would create an impression of favoritism); copies of FL DOC Inmate requests and responses on file with *amici* Aleph Institute, *e.g.*, Nov. 29, 1993: Jewish inmates in Florida were denied Tefillin bindings (to be kept in the chaplain's office and worn only for daily prayer) as a possible security risk when other inmates were allowed belts, shoe strings, weights, chairs, tables, etc.

See, e.g., Death Row Inmate Wins Fight to Wear Yarmulke, MIAMI HERALD 11A (Apr. 4, 1996) (for many years orthodox Jewish inmate on death row was denied right to wear yarmulke for "security reasons" until court decided in RFRA suit that the ban on yarmulkes was "overly restrictive" and "prison security would not be compromised"); P. Nolan, *Justice Spotlight*, 13 JUS-

prisoners' religious rights as weighed against the governmental interests in the operation of prisons.[25] Indeed, the application of RFRA to prisoners was one of the most hotly-debated aspects of the deliberations. After lengthy consideration, factfinding and debate, the Senate voted against an amendment to exclude prison inmates from RFRA's protections.[26] In doing so, it considered—and rejected—all of the arguments by prison officials repeated here.

Claims arising under RFRA may have caused administrative inconvenience in determining how accommodation could be achieved where religion, its needs and observances were not understood, or where the practices involved only a small percentage of the inmate population. RFRA now gives inmates hope that their requests will not be summarily ignored, delayed or denied *de facto* by transfer. RFRA now requires that sincere inmate requests for religious exercise be respected *ab initio* and denied only on proper grounds.

TICE REPORT (Jan. 1997) (prison officials interfered with religious worship of Baptists, Catholics and other "traditional" faithful); *Standing for Religious Freedom*, 13 JUSTICE REPORT (Jan. 1997) (Catholic women inmates were denied permission to hold Christmas Mass at the L.A. County women's jail, as "all activities were cancelled during the holidays" until RFRA action was threatened). *See also Campos v. Coughlin*, 854 F .Supp. 194 (S.D.N.Y. 1994).

[25] The growing use of private prisons—now capable of incarcerating approximately 50,000 persons, *see Testimony Regarding Correctional Privatization: Oversight Hearing on Matters Relating to Bureau of Prisons before Subcomm. on Crime of the House Comm. on the Judiciary, 104th Cong.*, 1st Sess. (June 8, 1995) (statement of Charles Thomas)—also raises important legal questions, including whether the State can contract away inmates' free exercise rights, whether private custodians are subject to RFRA and other federal laws as are their state counterparts, and whether private prison guards enjoy the same immunity as state guards, a question pending before this Court, *see McKnight v. Rees*, 88 F.3d 417 (6th Cir.), *cert. granted*, —— U.S. ——, 117 S.Ct. 504 (Nov. 27, 1996).

[26] *See* 139 CONG. REC. S14468 (daily ed. October 27, 1993).

Since RFRA's enactment, no genuine governmental interest in safety, security and order has been lost or compromised due to successful RFRA claims. Prisons have not experienced disorders or breaches of security where proper training procedures have been followed by officials. Spurious RFRA claims have been or may in the future be filed by inmates because such spurious claims were also filed before RFRA. In a settling period of transition, adjustments to new law take time and the purported burden of adjustments is no basis to invalidate a statute. Finally, new federal legislation that diminishes the incentive and ability of inmates to press frivolous lawsuits is alleviating administrative burdens from excessive inmate litigation.[27]

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[27] On April 26, 1996, Congress enacted the Prison Litigation Reform Act of 1996, 18 U.S.C. § 3626 ("PLRA"), primarily to curtail claims brought by prisoners under 42 U.S.C. § 1983 and the Federal Torts Claims Act . . . many of which are routinely dismissed as legally frivolous." *Santana v. United States*, 98 F.3d 752, 755 (3d Cir. 1996). The Act applies to all civil proceedings and appeals, *In re Nagy*, 89 F.3d 115, 116-17 (2d Cir. 1996), including those raising RFRA. *See, e.g., Sasnett v. Sullivan*, 91 F.3d 1018, 1023 (7th Cir. 1996); *James v. Lane*, —— F.Supp. ——, 1996 WL 738957 (N.D.Ind. Dec. 13, 1996) (terminating consent decree obtained by Muslim inmates pursuant to RFRA). *Amici* share the concerns of prison officials over frivolous inmate litigation, but there is simply no reason to believe that RFRA's enactment is generating any greater degree of litigation. *See Green v. Nottingham*, 90 F.3d 415, 418 (10th Cir. 1996) (*"As of 1981*, Mr. Green had filed between 600 and 700 complaints in state and federal courts, many of which had been dismissed as malicious or frivolous.") (emphasis added). The means Congress chose to accomplish these ends—discouraging and limiting the ability of inmates to bring malicious or frivolous civil claims of any variety (religious or otherwise)—addresses the underlying concerns of the States opposing RFRA without undermining the paramount interest of religious freedom.

Courts and prison officials are certainly aware of PLRA's passage. As of January 3, 1997, the PLRA had helped the federal appellate courts dispose of more than 200 appeals—almost all by summary unpublished disposition. *See Inmate Litigation and the PLRA*, in CORRECTIONS COMPENDIUM: THE NATIONAL JOURNAL FOR CORRECTIONS, Volume XXI, No. 12 (December 1996).

As patterns of claims emerge from inmates, including those representing a diversity of minority religions in American culture, new procedures and administrative efficiency will follow. State officials can follow their federal counterparts in acquiring better knowledge and skill in accommodating such claims, and can distinguish other claims that are either insincere or that pose an unreasonable risk to the necessary interests of prison security and order. Indeed, the Federal Bureau of Prisons and some states have already established working systems.[28] Instead of misunderstanding or ignoring the needs of minorities because their religious practices do not conform to the public's perception of what should constitute a religious practice, state chaplains and wardens can also learn to reach appropriate accommodations without rancor or disparagement of religion.

Indeed, the brief by *amici* States actually illustrates that Congress responded to an important problem with respect to prisoners' religious freedom. *Amici* States complain that RFRA requires them to investigate religious claims and accommodate "even the most unusual and isolated demands," *Amici* States' Br. at 4, apparently something they felt no need to do otherwise. They claim that RFRA "diverts" chaplains from delivering religious services and maintaining pastoral relationships because of increased

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[28] *See, e.g.*, National Institute of Corrections Academy live video conference, July 27, 1995, held to educate federal and state corrections officials about RFRA. Rev. Bryn Carlsen, Director of Religious Services, Federal Bureau of Prisons, listed eight strategies for the implementation of RFRA: (1) Determine specifically what is being requested; (2) Determine what is being done elsewhere; (3) Consult local and national religious resources; (4) Determine what, if any, court cases have set precedent; (5) Determine what is the least restrictive alternative available; (6) Establish an institutional evaluation process for determining questions of compelling interest and least restrictive means; (7) Institute a system-wide administrative process for making the decisions; (8) Ensure that decisions contribute to equity and consistency. See also the Washington and Missouri state policies discussed *supra* at note 7.

demands. This claim tacitly concedes that the needs of religious minorities have long been ignored or denied.

RFRA undoubtedly requires an adjustment for those prison officials who are insensitive to the importance of the spiritual dimension of inmates' lives, affected by the standardization and depersonalization that diminishes dignity and humanity. When inmates are first incarcerated, they relinquish driver's licenses and watches, signifying submission to authority, a deprivation of autonomy associated with personal mobility and the ability to tell time. Inmates are assigned a personal number that becomes, instead of their name, the means of their official and primary identification. Loss of freedom, an obligation to "do" time, demoralizing feelings of disgrace as outcasts, counting the days to a parole hearing or release as a numbered individual—all become features of a prisoner's life.[29] When a prisoner's right to the exercise of religion can nevertheless be successfully asserted, it signifies that society does not intend incarceration to extinguish the human significance and meaning derived from free religious exercise.[30]

Just as Congress, in effect, rejected the notion that a prisoner's right to religious exercise diminishes the authority of state officials, so it implicitly recognized that a prisoner's spiritual life is not held at the sufferance of the state or withheld as society's retribution for crime. Inmates can and do share with persons outside prison walls

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[29] *See* C. Colson, *Towards an Understanding of Imprisonment and Rehabilitation*, in J. Stott & N. Miller, eds., CRIME AND THE RESPONSIBLE COMMUNITY 153, 155-158 (1980); W. MOBERLY, *supra* note 22, at 264.

[30] J.B. Weinstein, *Prison Need Not Be Mandatory: There Are Options Under the New U.S. Sentencing Guidelines*, 28 No. 1 JUDGES' J. 16 (Jud. Admin. Div. Amer. Bar Ass'n 1989) (statement of the Hon. Judge Jack B. Weinstein: "Rabbi Sholom Lipskar, the guiding force of the Aleph Institute, and his associates understand and force us to face the fact that each person deserves to be treated with respect as an individual personality and not as an integer, a faceless number.").

a spiritual perspective on which their hope for the future rests, a faith that transcends the difficulties of confinement, loss of rights, poverty, physical disabilities due to age, and even impending death. Faith's exercise must not be sacrificed because states may have fewer dollars to care for rising prison populations.

No longer should it be assumed that accommodating inmates' religious needs can be deferred or denied by prison officials if the requests are nominally inconvenient. Prior to RFRA, chaplains were not encouraged to facilitate responses to inmates' requests for religious accommodation, which were often perceived as interfering with the regimen, routine, and uniform order of prison life. Now, where religious requests are involved, chaplains can obtain further resources and education to help serve religious traditions, process requests for religious exercise, and consider each on its merits. Appropriate requests should now receive prompt and serious consideration because of RFRA.

Congress did not intend RFRA to result in a judicial disregard of necessary penological interests. Courts have upheld, against RFRA challenges, actions or policies of prison administrators for a variety of reasons.[31] More notably, federal prison administrators have utilized RFRA compliance programs to assist in accommodating legitimate requests for religious accommodation. As a result of these federal efforts, the administrative burden is mini-

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[31] *See, e.g., Abdur-Rahman v. Michigan Dept. of Corrections*, 65 F.3d 489 (6th Cir. 1995) (denial of pass to attend religious services justified on security grounds); *Ishmawiyl v. Vaugh*, 1995 WL 461949 (E.D. Pa. Aug. 1, 1995) (mother of Muslim inmate allowed to visit and required to unveil before female corrections officer when officer was available); *George v. Sullivan*, 896 F. Supp. 895 (W.D. Wis. 1995) (restricted literature that inmate acknowledged fostered racial animosity); *Rhinehart v. Gomez*, 1995 WL 364339 (N.D. Cal. June 8, 1993) (mandatory tuberculosis testing didn't burden religion).

mized.[32] RFRA's focus on making all reasonable efforts to meet legitimate needs benefits not only inmates, but also society in increasing rehabilitation and reducing the costs of recidivism.

II. RFRA IS A PROPER EXERCISE OF CONGRESS' CONSTITUTIONAL AUTHORITY.

RFRA is before this Court with the weighty presumption of constitutionality accorded to acts of Congress and the support of every appellate court that has decided its validity as applied to *state* action.[33] Moreover, the only court to address RFRA's constitutionality as applied to *federal* action also upheld it.[34] Nevertheless, Petitioner and its supporting *amici* contend that Congress lacked

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[32] *See* 139 CONG. REC. S14461-01, S14462 (daily ed. Oct. 27, 1993) (statement of Sen. Lieberman) (noting absence of evidence that without a prison exemption RFRA "will open the floodgates for prisoners' religion-based claims.").

[33] *See Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir.), *rehearing and rehearing en banc denied*, 83 F.3d 421, *cert. granted*, 117 Cir. 1996), *pet. for cert. filed*, 65 U.S.L.W. 3370 (1996); *South Jersey Catholic School Teacher Ass'n v. St. Teresa Church Elementary School*, 290 N.J.Super. 359, 382, 675 A.2d 1155, 1167 (App.Div.), *cert. granted*, 146 N.J. 567, 683 A.2d 1162 (1996); *Gallo v. Salesian Soc'y*, 290 N.J.Super. 616, 643 n.3, 676 A.2d 580, 593 n.3 (App. Div. 1996); *State v. Miller*, 196 Wis.2d 238, 247-48, 538 N.W.2d 573, 577 (Wis. App. 1995), *aff'd*, 202 Wis.2d 56, 549 N.W.2d 235 (1996); *see also United States v. Bauer*, 84 F.3d 1549, 1558-59 (9th Cir.), *cert. denied*, —— U.S. ——, 117 S.Ct. 267 (1996).

[34] *See E.E.O.C. v. Catholic Univ.*, 83 F.3d 455, 469-70 (D.C. Cir. 1996); *see also* M. Paulsen, *A RFRA Runs Through It*, 56 Mont. L. Rev. 249, 253 (1995) ("Congress possesses the same power to pass RFRA, as RFRA concerns federal statutes, as it had to pass those other federal statutes in the first place."); D. Laycock & O. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 211 (1994) (RFRA "is both a rule of interpretation for future [and past] federal legislation and an exercise of general legislative supervision over federal agencies, enacted pursuant to each of the federal powers that gives rise to legislation or agencies in the first place.").

constitutional authority to enact RFRA and violated the separation of powers by attempting to overrule or supersede this Court's decision in *Smith*. Because Respondents and other supporting *amici* address these arguments, *amici* here focus only on aspects of the Equal Protection Clause and Congresss' authority to legislate in the wake of *Smith* that have particular relevance to free exercise rights of inmates under RFRA.

A. RFRA Directly Enforces the Equal Protection Clause of the Fourteenth Amendment.

In adopting RFRA, Congress expressly relied upon its power under the Fourteenth Amendment, the First Amendment, and the Necessary and Proper Clause of Article I, Section 8 of the Constitution.[35] The Fourteenth Amendment authorizes Congress to enact legislation to enforce the Amendment's requirement that no State shall: (1) "abridge the privileges or immunities of citizens of the United States"; (2) "deprive any person of . . . due process of law"; or (3) "deny to any person . . . the equal protection of the laws."[36] The arguments over RFRA's

[35] *See* S. REP. No. 111, 103d Cong., 1st Sess. at 13-14 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903; H.R. REP. No. 88, 103d Cong., 1st Sess. (1993).

[36] Congress' express reliance on the Fourteenth Amendment does not diminish any other source of legislative power that may support RFRA. For instance, the Article 1, Section 8 Commerce Clause power forms the basis for other civil rights statutes, such as the Civil Rights Act of 1964. In unanimously upholding that Act—which prohibits discrimination on the basis of "religion" as well as "race, color, and national origin" (and "sex," as later amended)—under the Commerce Clause, this Court spoke in terms that equally support RFRA. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257 (1964) ("That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid."); *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964) ("a number of witnesses attested to the fact that racial discrimination was not merely a state or regional problem but was one of nationwide scope. . . . [C]ongress appropriately considered the importance of that connection with the knowledge that the discrimination was but 'representative of many others throughout the country, the total incidence of which if left unchecked may

validity, however, have focused almost exclusively on congressional power to enforce *not* an express provision of the Fourteenth Amendment but an "incorporated" right, *i.e.*, the right to religious freedom secured by the Free Exercise Clause of the First Amendment.[37] *Amici* agree

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well become far reaching in its harm to commerce.' ") (citation omitted). In the prison context, a substantial effect on interstate commerce is not difficult to conceptualize, given the increasingly common practice of interstate transfer of inmates and the growth market in "privatized" prisons (where fundamental rights such as free exercise may be lost).

Because the Court in *Heart of Atlanta* and *McClung* unanimously found the Civil Rights Act to be authorized by the Commerce Clause, the Court found it unnecessary to also consider whether the Act was authorized by Section 5 of the Fourteenth Amendment. Nonetheless, at least two justices would have specifically held that the Fourteenth Amendment also authorized the Act as applied to these private businesses. *See Heart of Atlanta*, 379 U.S. at 281 (Douglas, J., concurring) ("The rights protected are clearly within the purview of our decisions under the Equal Protection Clause of the Fourteenth Amendment."); *id.* at 293 (Goldberg, J., concurring) (Fourteenth Amendment "guarantees to all Americans the constitutional right 'to be treated as equal members of the community' "). The Act's application to the states as employers is independently authorized by Section 5 of the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 n.9 (1976); *accord Guardians Ass'n of NY City Police Dep't v. Civil Service Comm'n*, 630 F.2d 79, 88 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); *Scott v. City of Anniston*, 597 F.2d 897, 900 (5th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980); *Blake v. City of Los Angeles*, 595 F.2d 1367, 1373 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980); *United States v. Commonwealth of Virginia*, 620 F.2d 1018, 1023-25 (4th Cir.), *cert. denied*, 449 U.S. 1021 (1980); *United States v. City of Chicago*, 573 F.2d 416, 423 (7th Cir. 1978) ("It is undisputed that the 1972 Amendments to Title VII are an enactment to enforce the anti-discrimination prohibitions of the Equal Protection Clause . . . .").

Whether power for Title VII's application to the States is derived from the Commerce Clause, the Fourteenth Amendment, or a combination thereof (*e.g.*, *Scott*, *supra*), both lines of reasoning support Congress' enactment of Title VII and RFRA as anti-discrimination statutes.

[37] *Cantwell*, 310 U.S. at 303.

with Respondents and the appellate courts that congressional power under the Fourteenth Amendment includes the power to enforce such incorporated rights,[38] particularly the right of religious freedom secured by the Free Exercise Clause,[39] but congressional power to enact RFRA is not so limited. RFRA is also designed to enforce *directly* the Fourteenth Amendment's guarantee of "equal protection," at the heart of which, like the Free Exercise Clause, lies the principle of anti-discrimination or nonpersecution.[40] The drafters of the Fourteenth Amendment intended the Amendment not only to protect against *de jure* facial religious discrimination, but also to guard against *de facto* discrimination evidenced by discriminatory effects on religious practice.[41]

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[38] *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968); *Katzenbach v. Morgan*, 384 U.S. 641, 651-55 (1966).

[39] Free exercise of religion has long been recognized as part of the liberty interest substantively protected by the Due Process Clause. *See Cantwell*, 310 U.S. at 303. This right was also considered one of the "privileges or immunities of citizens of the United States" when the Fourteenth Amendment was adopted. K. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. REV. 1106, 1146-49 (1994), and there is no apparent impediment to recognizing it as such. *See, e.g., Rouser v. White*, 944 F. Supp. 1447, 1996 WL 631130, *4 & n.8 (E.D. Cal. 1996) (upholding RFRA as a proper enforcement of Privileges or Immunities Clause of Fourteenth Amendment); *cf.* R. T. Cruz, Comment, *Animal Sacrifice and Equal Protection Free Exercise:* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 17 HARV. J. L. & PUB. POL'Y. 262, 272 (1994) (suggesting that the Free Exercise Clause may be incorporated through the Equal Protection Clause).

[40] *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 523 (1993) (Free Exercise Clause embodies "fundamental nonpersecution principle"); *id.* at 532 ("historical instances of religious persecution and intolerance . . . gave concern to those who drafted the Free Exercise Clause"); *id.* at 540 (Kennedy, J., joined by Stevens, J.) ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases.").

[41] *See Lash, supra* note 39, at 1149 (1994) (authors of the Fourteenth Amendment intended it to protect substantive religious ex-

Smith articulated formal neutrality of government action as a constitutional standard of protection for religious exercise. Post-*Smith* concerns about religious discrimination in America due to government insensitivity and hostility to religious practice prompted the enactment of RFRA [42] and related anti-discrimination measures taken by the legislative and executive branches to protect religious exercise.[43] After several rounds of hearings on RFRA, Congress "concluded that *Smith*'s focus on facial

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ercise against government interference); *cf. Bush v. Vera*, —— U.S. ——, 116 S. Ct. 1941, 1969 (1996) (O'Connor, J., concurring).

[42] *See, e.g., Flores*, 73 F.3d at 1358-59 ("Witnesses at congressional hearings spoke eloquently of the need for legislation to defend individuals, particularly those from minority religions, from generally applicable laws that burden the exercise of religion. [T]he Senate Judiciary Committee found the need for legislation to 'assure that all Americans are free to follow their faiths free from governmental interference.'") (citations omitted).

[43] *E.g.*, the 103d Congress passed the American Indian Religious Freedom Act Amendments of 1994 ("AIRFA") to remedy long-standing religious discrimination against Native Americans. 42 U.S.C. § 1996a (1994). As part of its welfare reform law, the 104th Congress included an anti-discrimination provision that allows states to contract with private organizations to provide welfare services but prohibits states from discriminating against religious organizations in administering the federally funded programs. 42 U.S.C. § 604a (1996). The President has not only actively supported RFRA and these other anti-discrimination provisions, he has also issued Guidelines to help defuse the religion-hostile environment in public schools. *Text of President Clinton's Memorandum on Religion in Schools*, N.Y. TIMES, July 13, 1995, at B10. In response to apparent hostility to religion evinced by the Equal Employment Opportunity Commission's proposed Guidelines on Religious Harassment in public and private workplaces, the 103d Congress directed the EEOC in promulgating final regulations to "make explicitly clear that symbols or expressions of religious belief consistent with the First Amendment and the Religious Freedom Restoration Act of 1993 are not to be restricted and do not continue proof of harassment." P.L. 103-305, § 526 (Amendment No. 1804). Indeed, concerns about government insensitivity and hostility to religious belief and practice have led Congress to study the need for a religious freedom amendment to the United States Constitution (*e.g.*, Hearings Before House Com-

neutrality and general applicability has been ineffective in identifying laws motivated by antagonism to a religion or to religion in general." *Flores*, 73 F.3d at 1359. During the three years that Congress studied the need for RFRA, it found abundant evidence that religious discrimination was, in the words of *McClung*, 379 U.S. at 301, "not merely a state or regional problem but was one of nationwide scope." Congress found especially egregious examples of discrimination against adherents of minority religions, who are often subject to the discriminatory effects of facially neutral laws and powerless to obtain a political remedy.[44] RFRA was designed to remedy and prevent such instances of disguised or *de facto* discrimination. As stated by the court below:

> Congress could reasonably conclude that more exacting scrutiny of facially neutral legislation that burdens a religious practice is needed to protect adherents of minority religions. [R]elatedly, Congress could reasonably conclude that seeking religious exemptions in a piecemeal fashion through the political processes, particularly at the state or local government level, would place minority religions at a disadvantage. *See* The Federalist No. 10 (James Madison).[45]

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mittee on the Judiciary, Subcommittee on the Constitution (July 23, 1996)).

[44] *See, e.g.*, H.R. REP. No. 88, 103d Cong., 1st Sess., at 6 & n.14 (1993); 139 CONG. REC. S14461-01, S614467 (daily ed. Oct. 27, 1993) (statement of Sen. Danforth).

[45] *Flores*, 73 F.3d at 1360 (citations omitted). Chief Judge Posner came to a similar conclusion in *Sasnett v. Sullivan*, 91 F.3d 1018, 1021-22 (7th Cir. 1996):

> [C]ongress can properly legislate under section 5 to make the formal right of religious freedom of persons who lack political power in individual states (yet are somehow able to form or benefit from the formation of an effective coalition to obtain legislative assistance at the national level) a meaningful right. . . . Prisoners, Christian or otherwise, are a good example of a group whose claims to be able to exercise a meaningful freedom of religion are unlikely to be heard in state legislatures.

B. RFRA Does Not Improperly Overrule or Supersede *Smith*.

Petitioner's arguments distort the standard for constitutional review as well as RFRA's legislative history. Statements of individual lawmakers critical of *Smith* are irrelevant to determining the constitutional validity of their legislation.[46] Moreover, despite the motives that Petitioner attributes to certain lawmakers, the "more natural reading of the Act's provisions [is] that Congress's objective . . . was to overturn the *effects* of the *Smith* decision, not the decision itself." *EEOC v. Catholic Univ.*, 83 F.3d at 469 (emphasis added).[47] Even assuming the motives ascribed by Petitioner, RFRA "could still be within the scope of section 5 if *its effect* is, without infringing any constitutional rights, to make the legal remedies against violations of the free-exercise clause more effective because requiring less proof." *Sasnett*, 91 F.3d at 1021 (emphasis added).

RFRA does not negate *Smith*, but is its complement. As *Hialeah* explains, *Smith* retains the most "exacting scrutiny" of government actions in four instances—when government regulation: (1) is *not neutral, i.e.*, targets religious conduct or believers either facially or as applied in particular instances, *Hialeah*, 508 U.S. at 533-34; *Smith*, 494 U.S. at 878-79; (2) is not *generally applicable*,

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[46] *See Sasnett*, 91 F.3d at 1021 ("[I]t is not the motive of the legislators that is important . . . but whether the statute they pass is within the scope of their constitutional authority.").

[47] *Accord United States v. Bauer*, 84 F.3d 1549, 1558 (9th Cir. 1996) (RFRA "does not present itself as an interpretation of the Constitution overruling *Smith*; rather it consists of a command that must be followed as a matte rof federal law."). Indeed, properly viewed as a whole, RFRA's legislative history clearly demonstrates proper congressional purposes. *See, e.g.*, S. REP. No. 111, 103d Cong., 1st Sess. at 14 n.43 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903-04 (RFRA "does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition on governmental action. . . ."); H.R. REP. No. 88, 103d Cong., 1st Sess. at 1 (1993); *id.* at 15 n.3.

i.e., selectively burdens religious exercise, *Hialeah*, 508 U.S. at 542; *Smith*, 494 U.S. at 879-81; (3) creates a system of *individualized government assessment* of the reasons for the relevant conduct, allowing *individualized exemptions* from a general requirement, *Hialeah*, 508 U.S. at 537; *Smith*, 494 U.S. at 884; or (4) burdens religious freedom in conjunction with other constitutional rights, *i.e.*, a *hybrid* situation, *Smith*, 494 U.S. at 881-82.

In each of these four instances, the government action "is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Hialeah*, 508 U.S. at 533 (citing *Smith*, 494 U.S. at 878-79).[48] Indeed, the lower courts have not hesitated to invalidate government action in these instances.[49]

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[48] The Court's application of the compelling state interest test to the free exercise claim in *Hialeah* completely rebuts the arguments of RFRA's opponents that the compelling interest test is "incompatible" with free exercise adjudication and that *Smith* "abandoned" it due to judicial "inability" to apply it.

[49] *See, e.g., Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) (invalidating under *Smith/Hialeah* Army regulations directly burdening religion); *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994) (condemning under *Smith/Hialeah* city's action that partially blocked access to religious tent meeting); *Church of Scientology v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993) (applying *Smith* to condemn city's charitable solicitation law as not generally applicable), *cert. denied*, —— U.S. ——, 115 S.Ct. 54 (1994); *Rader v. Johnston*, 924 F.Supp. 1540 (D. Neb. 1996) (invalidating under *Smith/Hialeah* action of state university refusing religion-based exemption); *Keeler v. Mayor & City Council of Cumberland*, 940 F.Supp. 879 (D. Md. 1996) (invalidating under *Smith/Hialeah* historic landmark ordinance because city refused to extend its system of individual exemptions to case of religious hardship); *First Covenant Church v. City of Seattle*, 120 Wash.2d 203, 840 P.2d 174 (1992) (invalidating under *Smith* historic landmark ordinance because it singled out religious facilities, invited individualized assessments, and burdened free speech in addition to free religious exercise, *i.e.*, hybrid claim); *First United Methodist Church v. Hearing Examiner for Seattle Landmarks Preservation Bd.*, 129 Wash.2d 238, 916 P.2d 374 (1996) (applying *First Covenant Church* to prevent landmark designation of church).

RFRA protects religious exercise differently from Smith. Although RFRA applies to neutral laws of general applicability, it establishes a higher threshold for free exercise claims than does *Smith*. Under RFRA, "a plaintiff alleging a violation of RFRA must demonstrate that his right to the free exercise of religion has been *substantially burdened*." [50] This "substantial burden" trigger of RFRA has been debated recently in the federal courts. While the precise statement of the test varies, the clear trend is to interpret the burden requirement consistently with RFRA's legislative history, including congressional approval of Justice O'Connor's burden analysis in *Smith*.[51] The prevailing test for determining the existence of a substantial burden under RFRA requires a claimant to demonstrate that a practice "motivated by a sincerely held religious belief [was] significantly or meaningfully curtailed." [52] The minority test, applied consistently only

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[50] *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996) (emphasis added); *Storm v. Town of Woodstock*, 944 F. Supp. 139, 146 & n.6 (N.D.N.Y. 1996). A substantial burden exists where the state "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Jolly*, 76 F.3d at 476; *Storm*, 944 F. Supp. at 146 & n.6 (citations omitted).

[51] *See Sasnett v. Sullivan*, 908 F. Supp. 1429, 1440-45 (W.D.Wis. 1995) (detailing legislative history on "substantial burden," including citations to the record quoting *Smith*, 494 U.S. at 893 (O.Connor, J., concurring)), *aff'd*, 91 F.3d 1018 (7th Cir. 1996).

[52] *Sasnett*, 908 F.Supp. at 1444. Other RFRA decisions employing a form of this "religiously motivated" test include: *Sasnett*, 91 F.3d at 1022 (7th Cir. 1996); *In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996); *Mack v. O'Leary*, 80 F.3d 1175, 1178-79 (7th Cir. 1996); *Jolly*, 76 F.3d at 476-77; *Werner v. McCotter*, 49 F.3d 1476, 1480-81 (10th Cir.), *cert. denied*, —— U.S. ——, 115 S.Ct. 2625 (1995); *Small v. Lehman*, 98 F.3d 762, 766-68 (3d Cir. 1996); *Muslim v. Frame*, 897 F. Supp. 215, *denying reargument of* 891 F. Supp. 226 (E.D.Pa. 1995); *Turner-Bey v. Lee*, 935 F. Supp. 702, 703 (D.Md. 1996); *Stuart Circle Parish v. Board of Zoning Appeals*, —— F. Supp. ——, 1996 WL 685755, *12-16 (E.D.Va. Nov. 26, 1996); *Rouser v. White*, —— F. Supp. ——, 1996 WL 631130, *6-7 (E.D.Cal. Oct. 28, 1996); *In re Hodge*, 200 B.R. 884, 895-96 (Bankr.D.Idaho 1996). This prevailing formulation of the sub-

by the Ninth Circuit, requires a claimant to demonstrate that the burdened practice was (1) "mandated" by the claimant's faith, (2) a "central" tenet or belief of religious doctrine,[53] *and* (3) "substantially" interferred with.[54] The latter test raises the threshold burden on claimants much higher than Congress intended and may defeat RFRA's remedial purpose.[55]

Regardless of which version of the "substantial burden" test applies, the point is that RFRA requires it, whereas *Smith* and *Hialeah* do not. In *Hialeah*, "the Court did not consider whether the ordinances posed a substantial burden . . . but proceeded directly to the compelling interest test after it determined that the ordinances were not neutral or generally applicable." *Rader*, 924 F.Supp. at 1555 & n.28; *accord Hartmann*, 68 F.3d at 979 & nn.3 & 4; *Brown*, 35 F.3d at 849-50. "The rare cases which address acts or laws which target religious activity have never limited liability to instances where a 'substantial burden' was proved by the plaintiff. Applying such a burden test

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stantial burden test refutes the argument that RFRA is unconstitutional because it purportedly requires courts to judge the "centrality" or "relative importance" of religious benefits.

[53] No court outside the Ninth Circuit has adopted a "centrality" component to the substantial burden test. As recognized by Judge Pollak, every Justice of this Court rejected a centrality inquiry in *Smith*. *See Muslim*, 897 F. Supp. at 220.

[54] *See Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995); *accord Stefanow v. McFadden*, —— F.3d ——, 1996 WL 737423, *5 (9th Cir. Dec. 27, 1996). However, even courts within the Ninth Circuit do not always follow *Bryant's* strict test. *See, e.g., Cheema v. Thompson*, 67 F.3d 883, 885 (9th Cir. 1995); *Malik v. Brown*, 16 F.3d 330, 333-34 (9th Cir. 1994), *as amended*, 65 F.3d 148, 149 (1995); *Friend v. Kolodzieczak*, 65 F.3d 1514, 1522-23 (9th Cir.) (Ferguson, J., dissenting), *as amended on denial of reh'g and reh'g* 1996 WL 631130, *6-7; *In re Hodge*, 200 B.R. at 895-96.

[55] For an analysis of the troublesome consequences of the "central tenet" interpretation of "substantial burden" in the prison context, see D. Solove, Note, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459, 476-77 (1996).

to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment." *Brown*, 35 F.3d at 849-50 (citation omitted).

This difference between RFRA and the Free Exercise Clause is significant. For example, in *Brown*, the Third Circuit invalidated a city government action under *Smith/Hialeah* for "intentionally burdening religious worship," but did not apply RFRA because the resulting burden was not "substantial." *See Brown*, 35 F.3d at 848-49. In such instances RFRA cannot protect against what *Smith* and *Hialeah* absolutely forbid: religious discrimination. *Storm v. Town of Woodstock*, 944 F.Supp. 139 (N.D.N.Y. 1996), is similar in many respects; claimants could meet the constitutional standard under *Smith/Hialeah* but failed to meet the substantial burden threshold of RFRA.[56]

In such cases, government action violates one of the four principles of *Smith/Hialeah* and will likely be invalidated under the First Amendment. In those many instances where government action does not violate a principle of *Smith/Hialeah* but nevertheless "substantially burdens" a person's sincere religion exercise, the action likely violates RFRA, entitling the claimant to an exemption. Thus, far from "reversing" or "superseding" *Smith*, RFRA actually complements it, further safeguarding religious freedom.

C. RFRA Was Enacted in Accordance With *Smith*.

Fundamentally, Petitioner's arguments that RFRA impermissibly overrules *Smith* fail to accord *any* weight to this Court's closing invitation in *Smith* for the political branches to provide the necessary protections for religious exercise that the Court found were neither constitutionally required nor foreclosed.[57] Although RFRA is

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[56] For numerous additional examples, see the cases cited in note 49, *supra*.

[57] *See Smith*, 494 U.S. at 890 ("Just as a society that believes in the negative protection accorded to the press by the First

broader than other legislative accommodations of religion (e.g., religious corporations exemption from Title VII),[58] "Congress can properly legislate under section 5 to make the formal right of religious freedom of persons who lack political power in individual states (yet are somehow able to form or benefit from the formation of an effective coalition to obtain legislative assistance at the national level) a meaningful right." *Sasnett*, 91 F.3d at 1021-22. Moreover, RFRA's broad scope follows from Congress' determination that religious discrimination is a nationwide problem. Congress' provision of a *legislative* solution to such free exercise violations allows legislative flexibility to respond to changed circumstances, including evidence that free exercise violations are not being adequately addressed under existing law,[59] as Congress properly did when it expressly included—despite vigorous objections and much lobbying—the rights of prison inmates within the scope of RFRA's protections. The likely alternative to RFRA—a religious equality

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Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.") (citations omitted).

[58] *See S. Rosenzweig*, Comment, *Restoring Religious Freedom to the Workplace: Title VII, RFRA, and Religious Accommodation*, 144 U. PA. L. REV. 2513, 2527-28 (1996) (RFRA provides a new action for religious discrimination claims in the workplace).

[59] *See M. Pawa*, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1041 (1993); *cf. Vera*, 116 S. Ct. at 1968-69 (O'Connor, J., *concurring*) (upholding the Voting Rights Act as "an important part of the apparatus chosen by Congress to effectuate this Nation's commitment 'to confront its conscience and fulfill the guarantee of the Constitution' with respect to equality in voting," and stating that states should assume the constitutionality of the Act) (citing S. REP. No. 97-417, p. 4 (1982), 1982 U.S.C.C.A.N. 177, 181; *Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984) (affirming district court's opinion upholding Voting Rights Act)).

amendment to the Constitution—would not provide such flexibility to respond to new information and changing circumstances.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Of Counsel:

ISAAC M. JAROSLAWICZ
THE ALEPH INSTITUTE
9540 Collins Avenue
Surfside, Florida 33154-7127
(305) 864-5553

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MICHAEL JOSEPH WOODRUFF
Counsel of Record
SCOTT J. WARD
J. MATTHEW SZYMANSKI
STEPHEN M. CLARKE
GAMMON & GRANGE, P.C.
8280 Greensboro Drive
7th Floor
McLean, Virginia 22102-3807
(703) 761-5000